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In the

Supreme Court of the United States

OCTOBER TERM 1967

No. 655

LONE STAR STEEL COMPANY,
Petitioner,

v.

LOIS McGEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Argument	6
Conclusion	14
Appendix A—Opinion Below	A-1
Appendix B—Judgment Below	B-1
Appendix C—Order Denying Rehearing	C-1
Appendix D—Statute Involved	D-1

Page

Cases

Dawkins Lumber Co. v. L. Carpenter & Co., 213 Ky. 795, 281 S.W. 1013 (1926) 11

Duffy v. Armco Steel Corporation, 225 F. Supp. 737 (W.D.Pa., 1964) 11

Kelly v. General Electric Co., 204 F. 2d 692 (CCA 3, 1953), cert. den. 346 U.S. 868, 98 L. Ed. 390, 74 S. Ct. 137 11

Kelly v. General Electric, 110 F. Supp. 4 (E.D.Pa., 1953) 9, 10

Malvern Gravel Company v. Mitchell, 238 Ark. 852, 385 S.W. 2d 144 (1965), cert. den. 382 U.S. 828, 15 L. Ed. 2d 73 11

Michigan Public Utilities Commission v. Coral W. Duke, 266 U.S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925) 7

Powell v. Pacific Naval Air Base Contractors, et al., 21 Ca. R. 355, 209 P. 2d 631 (Dist. Ct. of App., Cal., 1949) 11

Shaw v. Monessen, 200 F. 2d 841 (CCA 3, 1952) 14

State ex rel. Silver Lake Ry. & Lumber Co. v. Public Service Commission of Washington, Wash. Sup., 201 P. 765 (1921) 11

Tap Line Cases, 234 U.S. 1, 58 L. Ed. 1185, 34 S. Ct. 741 (1914) 9

Tilson v. Ford Motor Company, 130 F. Supp. 676 (E.D. Mich., 1955) 11

Wells Fargo & Company v. Taylor, 254 U.S. 175, 65 L. Ed. 205, 41 S. Ct. 93 (1919) 7, 9

Statutes

28 U.S.C., § 1254(1) 2

45 U.S.C., § 51 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Lone Star Steel Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on June 23, 1967, which affirmed the judgment of the District Court for the Eastern District of Texas awarding a money judgment in favor of Lois McGee, respondent, and against your petitioner.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra, p. A-1) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on the 23rd day of June, 1967 (Appendix B, infra. p. B-1). A Petition for Rehearing duly filed was denied on the 26th day of July, 1967 (Appendix C, infra, p. C-13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is a private steel-making corporation which operates its own in-plant rail facilities, and which on infrequent occasions and without charge moves rail cars from its classfication yard to another's industry location inside its plant, thereby a "common carrier by railroad" subject to the Federal Employers' Liability Act?

STATUTE INVOLVED

The statute involved is the Federal Employers' Liability Act, 45 U.S.C. § 51 (35 Stat. 65), as amended, set forth in Appendix D, infra, p. D-1.

STATEMENT

Lois McGee, Respondent, brought suit against his employer, Lone Star Steel Company, Petitioner, seeking to recover damages for personal injuries under the FELA and the Safety Appliance Act. Lone Star defended on the

ground that it was not a "common carrier by railroad" and that therefore the above statutes were inapplicable and that the District Court had no jurisdiction of the suit.

Upon the pre-trial of the case it was established that the only contested issues of law were whether or not the above mentioned federal statutes were applicable, and whether or not Lone Star was a common carrier. (R. 128) At that time the District Judge ruled upon these issues and held as a matter of law that Lone Star was a common carrier by rail and that the statutes did apply. (R. 126) Therefore, no evidence in that regard was presented to the jury and no issue was submitted to it. Instead, the jury was confined to fact issues as to whether Lone Star was guilty of negligence or had violated the Safety Appliance Act, and the nature and extent of McGee's injuries. The jury returned a verdict in favor of McGee for $56,000, and from the judgment entered thereon Lone Star duly appealed to the United States Court of Appeals for the Fifth Circuit, which Court affirmed said judgment.

The sole point in controversy is this: Is Lone Star a common carrier by railroad? In this regard the evidence showed that Lone Star operates a large steel mill, enclosed with fences and with entry controlled at gates where guards are stationed. It owns several miles of rail trackage, all of which is inside the main plant. (R. 96, 97, 111, 150) It also owns its own rail equipment including engines and cars. (R. 53-55) Such trackage and equipment are utilized to perform the varied needs of a steel mill, such as moving

materials about the plant, moving hot metal and ingots, charging the furnaces and moving cars from the classification yard to other parts of the plant. (R. 99, 218)

There is only one rail connection out of the plant, being on a line owned by the Texas & Northern Railway Company (T&N), which is a common carrier by rail serving Lone Star primarily but also serving other entities along its route. (R. 142, 217) T&N is almost wholly owned by Lone Star, but each company has its own separate trackage, engines, cars, shops, and employees.

Customarily incoming rail cars consigned to Lone Star are delivered by T&N to Lone Star's classification yard and left there, after which Lone Star's crews and equipment distribute them throughout the plant. Similarly outgoing cars, whether loaded or empty, are brought back to the yard by Lone Star, where the T&N then picks them up for transportation toward their destinations. (R. 152)

Most of the freight traffic consigned to Lone Star (mainly raw materials) or shipped by Lone Star (mainly steel pipe), involves originating points or points of destination beyond the boundaries of Texas. (R-96)

There are a few separate companies who occupy space within the plant and carry on activities related to Lone Star's steel-making activity. On infrequent occasions rail cars come into the plant which are consigned to these companies. As to a part of such companies, the cars are delivered from Lone Star's yard to the particular company loca-

tion by T&N, and as to another part the cars are delivered by Lone Star. (R. 97-102, 187-192)

Illustrating the relative volume of movements of "foreign" cars made by Lone Star are these facts. Total rail car movements (including incoming cars, hot metal, etc.) made by Lone Star inside the plant exceed 200,000 per year. (R. 109) In the six-month period from 6/1/63 to 11/30/63 Lone Star moved 4,648 outbound cars for itself and 14,336 inbound cars for itself. During the same period it moved no outbound cars for any of the other companies located within the confines of the plant, and moved only 34 inbound cars from the classification yard to the particular company locations. (R. 100-102)

The obvious reason why Lone Star moved any cars to company locations within the plant was for Lone Star's own convenience. In those few instances where such movements were made, the companies involved were located considerable distances into the plant property from the classification yard and the operation of T&N trains into those areas of the plant would necessarily interfere with the efficiency of Lone Star's operations. (R. 150)

Except for the rare switching movements made by Lone Star for a few companies within the plant, and occasionally the movement of an empty gondola car for one other entity and occasionally a movement involving a contractor doing work for Lone Star in its plant, Lone Star has not moved rail cars for any other entity. (R. 109)

Lone Star has never made any charge for any rail movement on behalf of any person or company, nor has it received any payment therefor. Lone Star does not publish any tariffs regarding rail movements. (R. 106, 216) It has not handled any less-than-carload (LCL) movements for any other person; and it does not have any switching rates or line haul rates and receives no revenue, directly or indirectly, from anyone for rail shipments or movements. (R. 17, 18, 33-35)

ARGUMENT

The only question in this case is: Has Lone Star, by moving rail cars, on infrequent occasions and without charge, from its classification yard to an industry location inside its plant, thereby involuntarily brought itself within the concept of "common carrier by railroad"? Or stated differently, has Lone Star by such conduct placed itself in such position that it must, upon demand from any person, transport rail cars over its plant trackage without discrimination?

The Court of Appeals answered these questions in the affirmative, apparently upon the following reasoning. That since the T&N had an obligation under its line haul rate charges to deliver each car to each consignee's rail siding, and since Lone Star was in some few instances hauling such cars the last few hundred feet, Lone Star was in effect performing a part of the T&N's duties and Lone Star is therefore automatically a common carrier by rail, even though it makes no charges whatsoever for its services. It

is with this "ipso facto" conclusion that the Petitioner disagrees, and which we believe to be in conflict with the decisions of this Court and of other Courts of Appeals.

This Court held long ago that the term "common carrier by railroad," as used in the FELA, was used in its traditional or commonly understood sense, "that is to say, a railroad company acting as a common carrier." *Wells Fargo & Company v. Taylor*, 254 U.S. 175, 65 L. Ed. 205 41. S. Ct. 93 (1919).

The traditional or ordinary tests to be applied to determine whether a part is a common carrier of goods are these:

1. He must be engaged in the business of carrying goods for others as a public employment.

2. He must hold himself out as ready to engage in the transportation of goods for all persons indifferently and as a business, and not as a casual occupation.

3. The transportation must be for hire.

As distinguished from common carriers, a private carrier is one who does not hold himself out to the public as ready to act for all who desire his services, but instead undertakes in particular instances only to transport property or persons from one place to another either gratuitously or for hire.

Illustrating this distinction is *Michigan Public Utilities Commission v. Coral W. Duke*, 266 U.S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925). The plaintiff Duke sought to enjoin the enforcement of a Michigan statute regulating the business of carrying freight for hire by motor vehicle over public

highways. The statute applied to "common carriers", but defined this term in sufficiently broad language to include all carriers for hire. The facts indicated that the plaintiff had three contracts to haul automobile bodies from Michigan to Ohio, and did not haul for the public generally. He contended that he was a private carrier, not a common carrier, and that the statute violated various constitutional rights.

The Supreme Court agreed that the plaintiff was a private carrier and in so doing commented upon a number of factors which would distinguish his situation from that of a common carrier, p. 575:

> "He has no power of eminent domain or franchise under the State, and no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public, and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation."

The court went on to hold that if the contested statute were upheld the effect would be that Duke would then be a common carrier, burdened with all of the duties and obligations of other common carriers, and his equipment would necessarily be diverted from his activities as a private carrier into common carriage channels, thereby preventing him from performing his existing private contracts in interstate commerce, and thereby wrongfully interfering with such commerce. Finally the court held that to convert the property

of a private carrier into a public carrier would be taking private property without just compensation and would violate the due process clause of the constitution.

Finally, one who operates rail facilities for his own use is not a common carrier by rail nor a private carrier. This distinction, between plant facilities and "true agencies of transportation," has heretofore been recognized by this Court, including the frequently cited *Tap Line Cases*, 234 U.S. 1, 58 L. Ed. 1185, 34 S. Ct. 741 (1914). In its opinion covering these cases, this Court held that various short line railroad companies operating between timber lands and trunk lines tracks were in fact common carriers. But the facts indicated that the companies were "engaged in carrying for hire the goods of those who saw fit to employ them"; that they were classed as common carriers by the state government; and that they had the power of eminent domain. The opinion clearly illustrated that intra-plant rail operations would not constitute common carrier operations, and reiterated the principle that "the real criterion" in determining what is common carriage and what is intraplant carriage is "the right of the public to use the road's facilities and to demand service of it."

The opinion of the Court of Appeals in the present case is contrary to this Court's holdings in *Wells Fargo* and *Tap Line* cases, supra, and is contrary to the decision of the Court of Appeals for the Third Circuit in *Kelly v. General Electric Co.*, 204 F. 2d 692 (CCA 3, 1953), cert. den., 346 U.S. 868, 98 L. Ed. 390, 74 S. Ct. 137, which latter case is factually similar to our case.

The Court in the *Kelly* case wrote only a brief per curiam opinion in which it in effect adopted the trial court's opinion, as follows:

> "We find ourselves in complete agreement with the views expressed in the able and comprehensive opinion filed by Judge Clary in the district court, 110 F. Supp. 4, to which we need add nothing."

Therefore, to understand the Court's opinion in the *Kelly* case, it is necessary to examine the trial court's opinion, found at 110 F. Supp. 4. Briefly, the case concerned a similar situation wherein General Electric operated its own in-plant rail trackage and equipment, there was one rail connection with the Pennsylvania Railroad inside the plant, and the interchange and movement of rail cars was accomplished in much the same manner as it was done in our own case. In addition, at times, incoming cars containing less than carload shipments were delivered to the siding, which cars would be removed by General Electric to its buildings, its portion of the freight removed, and the cars returned to the siding for delivery by the Railroad to other consignees. It also concerned an injury suffered by a General Electric Employee who made claim under the FELA.

In holding that the General Electric Company was not a common carrier, the court stated, 110 F. Supp. 6:

> "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that it undertakes to carry for all people indifferently, and hence is regarded in some

respects as a public servant. The dominant and controlling factor in determining the status of one as a common carrier in his public profession as to the service offered or permitted. 9 Am. Jur., 430, 431 and case there cited. * * *

"There has been no showing by the plaintiff that the defendant General Electric Company comes within the terms of the general definitions of a common carrier above set forth. There is no showing that General Electric Company holds itself out generally to the public as offering services of transportation for hire, nor is there a showing that defendant engages in 'carrying for hire the goods of those who see fit to employ them,' *U. S. v. Louisiana & P. R. Co.*, 234 U.S. 1, 34 S. Ct. 741, 742, 58 L. Ed. 1185."

The Kelly decision is in accord with the numerous opinions of the district courts of the United States, particularly *Duffy v. Armco Steel Corporation*, 225 F. Supp. 737 (W. D. Pa., 1964) and *Tilson v. Ford Motor Company*, 130 F. Supp. 676 (E. D. Mich. 1955), and of the courts of the various states, for example, *Malvern Gravel Company v. Mitchell*, 238 Ark. 852, 385 S.W. 2d 144 (1965), cert. den. 382 U.S. 828, 15 L. Ed. 2d 73; *Dawkins Lumber Co. v. L. Carpenter & Co.*, 213 Ky. 795, 281 S.W. 1013 (1926); *Powell v. Pacific Naval Air Base Contractors, et al.*, 21 Ca.R. 355, 209 P. 2d 631 (Dist. Ct. of App., Cal. 1949); *State ex rel. Silver Lake Ry. & Lumber Co. v. Public Service Commission of Washington*, Wash. Sup., 201 P. 765 (1921), whereas the decision of the Court of Appeals in the present case is not. Many of these cases present fact situations almost identical with the facts in this case, and in some of them there was far more movement of "foreign" traffic than occurred here

The dominant theme running through these cases is that there must be (a) a holding out to the public to carry goods indiscriminately for all persons, and (b) for hire.

The Court of Appeals in this case also placed reliance upon certain cases involving terminal companies, switching companies and stockyard companies. Yet in every one of the cases cited the various entities, contrary to Lone Star's situation, were openly and obviously performing a "common or public calling" in the transportation of property by railroad, they were so holding themselves out to the public, they performed such services indiscriminately for anyone who requested them, and they were being paid for their services.

When viewed in a broad perspective, the decision of the Court of Appeals is not only contrary to the decisions of this Court and other Courts; it is also contrary to the overwhelming and undisputed evidence in the case. Certainly Lone Star lacks the usual trappings of a common carrier. Its trackage and rail activities are confined to its enclosed, guarded steel plant, and do not extend across the country nor from one rail connection to another. It publishes no tariffs and has no rate schedule. It makes no charge and receives no revenue for any rail activity. The ICC exercises no jurisdiction over its rail operations except to inspect the two engines which necessarily go upon the T&N Line at intervals. Lone Star does not handle any less-than-carload shipments containing anyone else's freight, does not trans-ship for anyone else and does not warehouse freight for anyone else.

As to its rail employees, they are members of the Steelworkers Union, not the Railroad Brotherhood Unions, and

they are subject to the Texas Workmen's Compensation Act. Thus McGee, as to the same injury involved in this case, filed a claim for workmen's compensation and was paid benefits thereunder, which claim is still pending. (R. 109, 110)

As to the car movements which Lone Star has made to outside companies located in the plant, such movements have been few in number and almost miniscule in number when compared with Lone Star's over-all car movements. Lone Star's movement of cars for others was at best casual and selective, and for its own convenience and efficient operations.

To summarize, the undisputed facts show that Lone Star has not engaged in the business of carrying for others as a public employment; has not held itself out as ready to engage in the transportation of goods for persons generally as a business; has not offered to serve the public indiscriminately; has not made any charge for any car movement; has no power of eminent domain; and has never intended to be a common carrier. If held to be such, its property which is intended for its own use in making steel products will necessarily be impressed with a public character, subject to diversion for public uses.

The Court of Appeals based its decision in part upon the fact that Lone Star almost wholly owned the T&N, admittedly a common carrier, and that the operations of the two are highly integrated and mutually dependent. By doing so, it reached a decision contrary to the decision of the Third

Circuit in *Shaw v. Monessen*, 200 F. 2d 841, (CCA 3, 1953) which involved the activities of the Pittsburgh Steel Company and its wholly owned subsidiary, Monessen Southwestern Ry. Co., which two companies had operations almost identical with those of Lone Star and the T&N. In refusing to apply the FELA to the over-all rail operations, the Court stated, P. 844:

> "It is suggested by the plaintiff that the court should be alert to avoid inter-company arrangements drawn to avoid federal jurisdiction. We accept that but see no evidence of such an arrangement here. We, on the other hand, should be alert to avoid the extension of an act applicable to employees in interstate transportation to cover those who are engaged in other occupations in industrial plants. Such an extension might well, in many instances, deprive an injured workman of his rights under a state compensation act where his right of recovery will not depend upon proof of negligence."

CONCLUSION

Lone Star is a steel-making company, not a common carrier. A writ of certiorari should be granted.

Respectfully submitted,

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In the
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23671

LONE STAR STEEL COMPANY,

Appellant,

versus

LOIS McGEE,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(June 23, 1967.)

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

GEWIN, Circuit Judge: This appeal is from a judgment rendered in an action brought in the United States District Court for the Eastern District of Texas against Lone Star Steel Company (Lone Star) and Texas & Northern Railway Company (T & N) by Lois McGee to recover damages for personal injuries under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, and the Safety Appliance Act, 45 U.S.C. §§ 1-16. Before trial McGee's motion to dismiss

T & N as a party defendant was granted. The district court held as a matter of law that the above federal statutes were applicable and that Lone Star was a common carrier by rail. The jury returned a verdict in favor of McGee for $56,000, and judgment was entered thereon.

McGee alleged in his complaint[1] that he was employed by Lone Star as a railroad switchman. While acting within the course and scope of his employment, McGee alleged that on August 6, 1963, he received injuries to his body which resulted from the negligence of Lone Star. He claimed that Lone Star was negligent in permitting a rail car to be used on its tracks with a defective coupler which could not be uncoupled without the necessity of going between the cars in violation of the Safety Appliance Act and that Lone Star was negligent in failing to furnish him a safe place to work and a safe means and method of work. He alleged that as a result of Lone Star's negligence he received severe, crippling and permanent injuries to his back and other portions of his body and that such injuries had totally destroyed or greatly diminished his earning capacity. He further contended that Lone Star is a common carrier by rail and therefore is subject to the provisions of the Safety Appliance Act and the Federal Employers' Liability Act and is liable to him for his injuries sustained through its negligence.

Lone Star admits that it is engaged in interstate commerce and that it is a carrier by rail. It strenuously denies that it is a *common carrier by railroad*, and therefore claims

[1] We have omitted from our discussion the allegations in the complaint against T & N in view of the fact that the suit was later dismissed as to it.

that the provisions of the Safety Appliance Act and the Federal Employers' Liability Act do not apply to it.

Lone Star's activities were the subject of a pretrial stipulation which will be discussed later. From the facts detailed in the stipulation and from a consideration of the law applicable to such facts, the district court in a pre-trial order held Lone Star to be a common carrier by rail. The issues of whether Lone Star was guilty of negligence or had violated the Safety Appliance Act and the nature and extent of McGee's injuries were submitted to the jury which returned the verdict mentioned earlier.

The sole issue on this appeal is whether the court erred in holding as a matter of law that Lone Star was a common carrier by rail and thus subject to the Federal Employers' Liability Act and the Safety Appliance Act. After a careful study of the record and a consideration of the arguments of both parties, we affirm the judgment of the district court.

The stipulation of the parties as to the activities of Lone Star and T & N in connection with their rail operations contains the following pertinent data: The T & N is a common carrier by rail in interstate commerce. The T & N main line extends from a point inside the Lone Star plant complex to an interchange yard near the junction of its rail facilities with those of the Louisiana and Arkansas Railway Company. T & N performs rail service for Lone Star, for companies located within the Lone Star Plant area, and for companies outside the Lone Star Plant at various locations along its line.

Lone Star owns extensive properties near Lone Star, Texas, within which it operates its main plant for the processing and production of steel and steel products from raw materials. Lone Star produces plate steel with a rolling mill to roll it into pipe. In addition, it produces and ships semi-finished products including coils, slabs, ingots pig iron and other products such as ammonium sulphate and benzol.

Within its plant proper Lone Star has a complex system of rail trackage covering several miles. As of August 6, 1963, it owned 8 diesel electric locomotives, 94 cars of railroad rolling stock and 6 railroad cranes. On the same date it had 57 employees performing duties in connection with its rail facilities such as switchmen, brakemen, engineers, firemen and maintenance personnel. In 1963 Lone Star's railroad equipment and crews made 205,248 rail car movements inside the plant. The Interstate Commerce Commission does not check any railroad equipment belonging to Lone Star with the exception of Lone Star's locomotives No. 3 and No. 4. None of the Lone Star equipment operates on T & N's track except these two locomotives.

Lone Star owns 3,308 shares of the 3,313 shares of common capital stock issued by T & N and from October 1, 1955, to September 30, 1965, T & N paid to Lone Star $2,000,000 in dividends. From 1950 to the present the parties have entered into numerous agreements concerning land, cars, rails, locomotives, rail equipment, safety equipment, and the interchange between the parties as to outbound and inbound cars.

Various industries maintain facilities within the Lone Star plant area, and their operations are integrated with the overall operation of Lone Star such as coating and wrapping Lone Star Steel pipe, using Lone Star slag to produce gravel or separating metals from ore thereby reclaiming what would otherwise be a waste product of the Lone Star Steel mill operation. During the past ten years some fourteen entities, independent of ownership or control by Lone Star have maintained facilities within the plant. At least seven of these have shipped and/or received commodities by rail during this period. Three subcontractors engaged in construction work for Lone Star in its plant received material furnished by Lone Star in part by rail. Other entities supplied material and equipment to Lone Star which were received in part by rail and furnished service representatives for installation. Additionally, 66 prime contractors who furnished their own labor, material, equipment, etc., received their supplies in part by rail.

The primary point of interchange between the Lone Star and T & N rail systems is the classification yard located just inside Lone Star's boundary line. The only track in the classification yard not owned by Lone Star is the T & N main line which runs the length of the yard. T & N operates with respect to shipments for Lone Star and the companies located within its plant area in what is known as a "line haul freight movement by rail." In such an operation T & N is obligated to deliver rail cars to the consignee's sid-

ing or industry track and to pick up outbound shipments at the consignor's siding. Therefore rail service between the T & N track in the classification yard and the siding of industries involved is provided and this service is included in the line haul freight rate charged by T & N.

This rail service between the classification yard and the shipper industry is performed by both T & N and Lone Star. Lone Star has handled inbound shipments for one industry, C. A. Hackett, Inc., operating within its plant area and has handled all its own inbound and outbound shipments as well as handled all inbound and outbound shipments for Linde Gas Co., Texstar, Inc., and Southwestern Electric Power Co. Also Lone Star has handled the switching movements involving equipment or material of a construction contractor on the plant premises.

Lone Star makes no direct charge by way of tariffs and receives no direct freight revenues for any rail services performed by it, and publishes no tariffs regarding mail movements. However, T & N's freight charge includes a charge for the rail services involved in picking up and delivering cars to a particular industry, as mentioned above, and this charge is made regardless of whether T & N handles the entire rail movement or Lone Star handles a portion of such movement.

It is contended by McGee that under the various agreements between Lone Star and T & N, regarding the opera-

tion of their respective rail systems, the parties are engaged in a joint undertaking, that of providing public rail transportation. Additionally, Lone Star actively participates in the operation by actually performing rail services paid for by the industries involved, albeit to T & N, and from which Lone Star receives the payment as dividends from T & N. Therefore, according to McGee, Lone Star is a common carrier under the Federal Employers' Liability Act. Lone Star contends that its intraplant rail operations are plant facilities and do not constitute common carrier operations. Also, Lone Star argues that since it makes no direct charge for its services and does not hold itself out to the general public as one engaged in the business of transportation for hire, but moves rail cars solely as an accommodation to T & N and the various industries located within its plant and for its own convenience, it is not a common carrier.

The Federal Employers' Liability Act by its terms applies to "every common carrier by railroad while engaging in commerce between any of the several States," 45 U.S.C. § 51, and the safety Appliance Act by its terms is applicable to "any common carrier engaged in interstate commerce by railroad," 45 U.S.C. § 1.

The common carrier concept has long been in usage. At an early date the term as used in the FELA was held in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 187, 65 L. Ed. 205, 213 (1920) to mean, "one who operates a railroad as a

means of carrying for the public [and] . . . this view . . . is in accord with the ordinary acceptation of the words . . . "

A more recent discussion of the term is found in *Kelly v. General Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd.* 204 F. 2d 692 (3 Cir.) *cert den.* 346 U.S. 868, 74 S. Ct. 137, 98 L. Ed. 390 (1953) where the district court stated:

> "A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of person or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant."

Neither of the parties questions the fact that T & N is a common carrier and it has been so stipulated. Lone Star admits that it is virtually the sole stockholder of T & N, and that their rail systems are the subject of numerous agreements such as (1) T & N would maintain safety signal equipment on Lone Star rails and maintain various turnouts in the Lone Star plant, (2) the rental of locomotive equipment, (3) certain tracks would be used for the interchange between the parties of outbound and inbound cars, and (4) T & N could use Lone Star's classification yard for switching purposes in order to serve customers other than Lone Star. Lone Star also admits that it performs rail service between its classification yard and various locations within its plant which T & N is obligated to perform and

for which charges are included in the T & N freight tariff.[2] However, Lone Star points out that these rail movements constitute only a small part of the overall in-plant rail movements made by Lone Star which according to the stipulation totaled more than 200,000 per year. In addition, Lone Star submits that it performed this rail service primarily for its own benefit in that Lone Star was actually a customer of these industries for which it rendered rail service and that it would seriously hinder the effective and efficient operation of its steel mill to allow T & N to use Lone Star's complex intra-plant rail facilities. Therefore Lone Star contends that despite its ownership of and contractual relationship with T & N and despite the fact that it has occasionally performed rail service for other parties, it is merely maintaining a railroad system for its own use and therefore its rail operations are plant facilities and not those of a common carrier.

[2] The following is from the brief of Lone Star:

> "Most of T&N's freight movements involve line haul movements, which means that the delivering carrier's duty includes the delivery of the rail car in question to the consignee's siding or industry track, and this service is included in the line haul rate charged by the connecting carriers. Conversely, the initiating common carrier ordinarily picks up the car at the consignor's siding, and his service is included in the rate charged."
>
> * * *
>
> "From time to time the above entities shipped or received materials by rail. Movements of such rail cars to and from Appellant's classification yard were made by T&N for General Dynamics, Gifford-Hill, Inc., Gulf Coast and Reilly Tar, utilizing T&N crews and equipment but operating over Appellant's tracks from the classification yard to the particular industry location.
>
> "On the other hand, Appellant's crews and equipment made such movements to and from its classification yard within the plant for C. A. Hackett, Inc., Linde Gas, Texstar, Inc. (all located in the south part of the plant) and Southwestern Power Co. (located on the west side of the plant)."

Courts have long recognized the distinction between plant facilities and "true agencies of transportation." In *New York Cent. & H.R.R. Co. v. General Elec. Co.*, 219 N.Y. 227, 114 N.E. 115 (1916) *cert. den.* 343 U.S. 636, 37 S. Ct. 400, 61 L. Ed. 941, the court held that where an industry maintains a complicated intra-plant railroad system, such rail operations will be regarded as plant facilities rather than those of a common carrier. The movement of freight within the plant is not common carriage but rather industrial plant usage.[3]

The rail operations of the defendant in *Duffy v. Armco Steel Corp.*, 225 F. Supp. 737 (W. D. Pa. 1964) were also held to be plant facilities. Armco was engaged in the manufacture of steel products and owned and operated railroad equipment within its manufacturing plant. This equipment was used to transport material and equipment from place to place in the plant and to Armco's other nearby plant. Inbound railroad cars were delivered by the Bessemer & Lake Erie Railroad to a track within the plant, and the cars were then distributed to various parts of the plant by Armco. This procedure was reversed on outbound shipments. The court held that Armco was not a common carrier under the FELA because its railroad equipment had not been used to transport goods of others, nor had Armco offered their use to the public.

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[3] See also Malvern Gravel Co. v. Mitchell, et al., 238 Ark. 852, 385 S.W. 2d 144, cert. den. 382 U.S. 828, 15 L. Ed. 2d 73 (1965); Powell v. Pacific Naval Air Base Contractors, et al., 21 Ca.R. 355, 209 P. 2d 631 (1949); Legislative Comm. of Railroad Bhds. v. P.U.C., 149 Ohio St. 511, 80 N.E. 2d 159 (1948).

The court in *Kelly v. General Elec. Co.*, 110 F. Supp. 4 (E.D. Pa. 1953) *aff'd.* 204 F. 2d 692 (3 Cir.) *cert. den.* 346 U.S. 868, 74 S. Ct. 137, 98 L. Ed. 390 also dealt with the question of whether an industry's operation of its internal rail system constituted such industry a common carrier under the FELA. General Electric was engaged in the business of manufacturing, rebuilding and repairing electrical equipment and other products. As part of its plant equipment it had a system of internal trackage some 2.17 miles in length, 2 switching engines, 9 cars which it rented to rail carriers, and 10 cars which it used for its own purposes. Its tracks were connected to a siding of the Pennsylvania Railroad located within its plant. The railroad delivered cars to the siding and thereafter the cars were removed and disfributed throughout the plant by General Electric's switching engines. Occasionally cars containing G. E.'s goods as well as goods of others were removed by General Electric to its buildings where it unloaded its goods and then returned the cars to the siding for delivery by the railroad to the other consignees. It was contended that General Electric was a common carrier because, inter alia, it moved property of others when it moved less-than-carload shipments and when it moved its outbound shipments to the siding, since goods were shipped FOB plant and title to the goods passed as soon as they were placed in the cars. General Electric contended that it maintained its railroad system for its own convenience and necessity in the conduct of its business. The court held that General Electric was not a common carrier under the FELA

in that it did not hold itself out generally to the public as offering services of transportation for hire, nor was it employed to carry goods of others for hire. The court found that there was nothing to indicate that the public could demand service of General Electric with respect to its rail facilities. The court concluded that moving less-than-carload shipments was for General Electric's own convenience and added nothing to the service contracted by Pennsylvania Railroad and the other consignees and no charge was made for the service. In addition, the court stated that carrying goods inbound and outbound to and from the siding was a common feature in every plant facility, and whether the shipment was inbound or outbound, it still comprised General Electric's products that it had sold or bought, and therefore General Electric was engaged solely in rail service for itself.

In other instances lumber companies which operated railroads primarily for their own use were found by the court to be private carriers, as opposed to common carriers, where the lumber companies engaged in some transportation of persons or property for hire. *Dawkins Lumber Co. v. L. Carpenter & Co.*, 213 Ky. 795, 281 S.W. 1013 (1926); *State ex rel Silver Lake Ry. & Lumber Co. v. Public Service Comm.*, 201 P. 765 (1921). The Court found them to be private carriers in that they did not hold themselves out to the public as being engaged in the business of transportation for any who wished to avail themselves of their serv-

ice but merely rendered rail service for certain people or certain businesses usually pursuant to contract.[4]

In comparing the railroad operations described in *Armco* and *Kelly* with those of Lone Star, we immediately find important differences. Although the principle use of Lone Star's intra-plant railroad, to move its own goods, equipment, etc., is identical to the rail operations in the above cases, Lone Star is engaged in a method of operation not found in those cases. It is regularly shuttling the goods of other business concerns located within its plant and thereby is performing a part of the total rail services which another railroad, T & N has obligated itself to perform. We find that these services which Lone Star has undertaken to perform clearly distinguish Lone Star's intra-plant railroad from those in *Armco* and *Kelly*. Additionally, Lone Star's operations are markedly different from those in *Dawkins* and *Silver Lake, supra.* In neither of those cases did the entity involved perform its rail services in connection with an interstate common carrier, whereas Lone Star's services are a necessary part of T & N's total rail operation. As a consequence, Lone Star cannot claim to be a private carrier because by undertaking the obligations of

[4] The following quote from Ward Transport, Inc., et al. v. Public Utilities Comm., 151 Colo. 76, 376 P. 2d 166, 169 (1962) aptly differentiates private carriers from common carriers.

> ". . . a private carrier is one who, without making it a vocation, or holding himself out to the public as ready to act for all who desire his services, undertakes, by special agreement in a particular instance only, to transport property from one place to another either gratuitously or for hire. He carries only for persons with whom he has an initial contract, and assumes no obligation to carry for others; and in this lies the chief distinction between a private carrier and a common carrier . . ."

a common carrier, T & N, it holds itself out to the public as being engaged in the business of public transportation. Moreover, since T & N holds itself out to the public as performing all the duties of a common carrier, Lone Star cannot claim that the duties it performs for T & N are not offered indiscriminately to the public.

In deciding whether Lone Star is a common carrier, its railroad operations can be compared to the operation of terminal facilities, *Southern Pacific Terminal Co., et al. v. ICC, et al.*, 219 U.S. 498, 55 L. Ed. 310 (1911); *United States v. Brooklyn Eastern Dist. Terminal*, 249 U.S. 296, 63 L. Ed. 613 (1919), stockyards, *United States v. Union Stock Yard & Transit Co., et al.*, 226 U.S. 286, 57 L. Ed. 226 (1912); *Union Stockyards Co. v. United States*, 169 Fed. 404 (8 Cir. 1909), and short line railroads, *United States v. California*, 297 U.S. 175, 80 L. Ed. 567 (1936). Although the business entities in these cases are in a general sense primarily engaged in aspects of rail transportation, while Lone Star is mainly a steel industry and engaged in railroading only as an incident to its business, the criteria used by the courts to determine whether these entities were common carriers are just as applicable in our determination of whether Lone Star is a common carrier.

In *Southern Pacific Terminal Co.* and *Brooklyn Eastern Dist. Terminal, supra*, the terminal companies were found to be common carriers. The Southern Pacific Terminal maintained wharves and docks for the accommodation of import and export traffic and it charged a fixed wharfage for all freight passing over its track facilities which were con-

nected to tracks of the Southern Pacific system. The court found that the Terminal and the railroads comprising the Southern Pacific System which were commonly owned by the Southern Pacific Co., a holding company, had been united into a system of which all were necessary parts; and since the Terminal formed a vital link in the chain of transportation, it was a common carrier and subject to regulation by the ICC. The operation of the Brooklyn Terminal included the transportation of freight from the Terminal to its docks and for these services it was paid by the railroad or steamship company. The Terminal, in contending that it was not a common carrier, argued primarily that it performed solely under contract with the railroads and therefore did not perform services rendered by the Terminal were public in their nature and of a kind ordinarly performed by a common carrier. The court stated that one is not precluded from being a common carrier merely because the rail transportation services which it renders to the public are performed as agent for another.

The stockyards in *Union Stockyards Co., supra,* presented essentially the same argument. While admittedly the stockyards were rendering a service which the railroads were bound to perform, they insisted that they were not a common carrier because the rail transportation services were performed for the railroad pursuant to contract under which the stockyards received a fixed charge per car and therefore the services were not performed for the public. The court found that the stockyard operation included the car-

riage of livestock for hire destined to or from its sheds or pens which in effect were the depot of the railroad companies. It was of little significance to the court that the stockyards did not hold themselves out to the public to carry livestock. It was sufficient that the railroad did so hold itself out to the public and the stockyards were willing to perform and actually did so perform a part of the service which the railroad companies had agreed to perform when the livestock were accepted for carriage. Therefore the stockyards were held to be a common carrier engaged in interstate commerce under the Safety Appliance Law.

Similarly, the stockyard in *Stock Yard and Transit Co., supra*, was found to be a common carrier. Although it had divested itself of its rail facilities by leasing them to the Junction Railroad, it loaded, fed, watered and cared for livestock in transit and received two-thirds of the profit of the Junction Railroad. The Investment Co., a holding Company, owned both the stockyard and the railroad. The court held that these companies, the stockyard and the Junction Railroad, engaged in carrier rail services when they loaded freight at the stockyard on cars, transported it for a distance under a through rate and bill furnished by the trunk line carrier, or received freight while in commerce upon a through rate which included terminal service rendered by the two, and completed its delivery to the consignee.

Likewise, the California owned State Belt Railroad was held in *United States v. California*, supra, to be a common carrier engaged in transportation by rail under the Safety Appliance Act because it transported freight back and forth

from industries to the railroads from which it received a flat charge per car. The court found that the services performed by the Railroad were of a public character for hire and held that all the essential elements of a common carrier were present, that is, the receipt and transportation for the public for hire of cars moving in interstate commerce.

According to these cases various considerations are of prime importance in determining whether a particular entity is a common carrier. First—actual performance of rail service, second—the service being performed is part of the total rail service contracted for by a member of the public, third—the entity is performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by a contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public, and fourth—remuneration for the services performed is received in some manner, such as a fixed charge from a railroad or by a percent of the profits from a railroad. The stockyards, the terminals and the California short line met these conditions and so also does Lone Star.

Unquestionably, Lone Star performs rail services and such services are a part of the total rail transportation contracted for and required by the industries located on its plant site. While it does not perform these services under contract with T & N, it certainly is an integral part of the T & N system of interstate rail transportation. And finally, even though it does not receive money in the form of direct transportation charges from T & N or from the industries

serviced, it is for all practical purposes the sole owner of T & N. It is closely allied with T & N, their operations are interwoven, and therefore it receives in the form of dividends a part of the rate charged the industries by T & N. It has been suggested that we cannot ignore the legal individuality of Lone Star and T & N and therefore, we are precluded from attaching any significance to the fact that Lone Star is essentially the sole stockholder of T & N and consequently receives dividends therefrom. It is contended that stock ownership does not make the two companies one. While we agree with this proposition, we do not think it is controlling because the record does not present a case of mere stock ownership. Instead the record reflects that the operations of the two are highly integrated and mutually dependent. In a similar fashion the court in *Southern Pacific Terminal Co., supra,* was faced with substantially the same problem and it found the Terminal Co., although a legally separate business entity, to be part of a railroad system. In *Southern Pacific Terminal* the court stated at page 523:

> "The record does not present a case of stock ownership merely, or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the terminal company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it." 219 U.S. 498, 523 (1911)

Stock ownership also played a part in the court's decision in the *Union Stock Yard* case, *supra*, where it stated at page 306:

> "We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits, and their common ownership by a holding company, are to be deemed a railroad * * *" 226 U.S. 286, 306 (1922)

Also courts have specifically rejected as a controlling criterion the status which the entity declares itself to be in determining whether the entity is a common carrier. "Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does." *United States v. California, supra*, 297 U.S. at 181. The answer to the question of whether an entity is a common carrier "does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; but upon what it does." *Brooklyn Eastern Dist. Terminal, supra*, 249 U.S. at 304.

The fact that Lone Star's carriage for other industries comprises only a minor portion of its rail movements also does not prevent it from being a common carrier. The court stated in the *Tap Line* cases:[5]

> "But this conclusion [that one is not a common carrier if only a small part of the traffic carried is the property of others] loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common

[5] United States v. Louisiana & P.R. Co., 234 U.S. 1, 58 L. Ed. 1185, 1194 (1913). See also Washington Univ. v. United States, 157 F.2d 112 (8 Cir. 1946).

> carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character."

Accordingly we conclude that Lone Star has gone beyond the permissible bounds of what is allowed in operating an intra-plant rail system as a plant facility. It has not restricted its use to the operation of its steel mill but has adopted the regular practice of transporting for others. In light of the rail services Lone Star has performed, the fact that such services are actually rendered in fulfillment of T & N's obligations as a carrier, and giving consideration to the facts disclosed in the record revealing the close connection between the two companies and their mutual dependence on each other, we conclude that both Lone Star and T & N are operating, jointly, a railroad system which constitutes each of them a common carrier.

JUDGMENT AFFIRMED.

APPENDIX B

B-1

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1966

No. 23671

D. C. Docket No. CA 1057-65

LONE STAR STEEL COMPANY,

Appellant,

versus

LOIS McGEE,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcrit of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Lone Star Steel Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 23, 1967

Issued as Mandate:

APPENDIX C

U. S. Court of Appeals
Filed
July 25, 1967
Edward W. Wadsworth,
Clerk

In the

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

No. 23,671

LONE STAR STEEL COMPANY,

Appellant,

v.

LOIS McGEE,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(July 26, 1967)

ON PETITION FOR REHEARING

Before GEWIN, COLEMAN and GOLDBERG, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

CERTIFICATE

The undersigned hereby certifies that copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have this date been served upon counsel for Respondent by depositing same in the United States mail, with sufficient postage affixed, properly addressed, as follows:

Mr. Franklin Jones, Jr.
Jones, Jones & Baldwin
Post Office Box 1249
Marshall, Texas

DATED at Dallas, Texas, this ..... day of ....., 1967.

.....

Spencer C. Relyea III